NOVA SCOTIA COURT OF APPEAL
Citation: ***R.K. v. H.S.P.***, 2009 NSCA 2

Date: 20090109
Docket: CA 296435
Registry: Halifax

Between:

R.K.

Appellant

v.

H.S.P., L.A.C. and Minister of Community Services and Family and Children's Services of Cumberland County

Respondents

Restriction on publication: **pursuant to s. 94(1) of the Children and Family Services Act**

Judges: MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.

Appeal Heard: December 10, 2008, in Halifax, Nova Scotia

Held: Notice of Appeal quashed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.

Counsel: Andrew Pavey, for the appellant
Peter McVey, for the respondent Minister of Community Services
Gordon R. Kelly, for the respondent Family and Children Services of Cumberland County
respondents, H.S.P. and L.A.C. not participating

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] The applicants, the Minister of Community Services (the "Minister"), the Family and Children's Services of Cumberland County (the "Agency") and the adoptive parents of two children, have applied pursuant to **Civil Procedure Rule** 62.18, to quash a Notice of Appeal filed by the birth father of the children, R.K. He purports to appeal the April 24, 2008 adoption orders granted in relation to the children, who at the time of adoption, were in the permanent care of the Agency. The applicants ask that the Notice of Appeal be struck on the basis that R.K. has no standing to appeal the adoption order.

[2] The issue of the appellant's standing first arose before Cromwell, J.A. (as he then was), in Chambers (reported as 2008 NSCA 63), the appellant having made application for directions on the contents of the Appeal Book. Pursuant to **Civil Procedure Rule** 62.31(7)(d), he referred both the application for directions and the question of R.K.'s standing to a panel of the Court for determination. The applicants then applied to the panel to quash the Notice of Appeal.

BACKGROUND

[3] The children were born in the spring of 2002 and 2003. They were apprehended from their mother's care in August 2004. At that time she was separated from R.K. From the time of apprehension until adoption they were continuously in the care of the Agency and, but for six months when they were placed with another prospective adoptive family, resided with the foster parents who became their adoptive parents.

[4] The Agency had commenced the protection application on July 19, 2004. R.K. was represented by counsel in that proceeding, participated fully and filed a plan asking that the children be placed in his care. On October 28, 2005, after a five day final hearing, David Milner, J.F.C. determined that it was in the best interests of the children that they be placed in the permanent care of the Agency, without access to the parents. Neither parent appealed within the 30 day appeal period (**Children and Family Services Act**, S.N.S. 1990, c. 5, s. 49 (the **CFSA**)).

[5] On January 12, 2006 R.K. applied to this Court for an extension of the appeal period. His application was heard by Fichaud, J.A., in Chambers.

According to the evidence placed before the judge on the application, save when the oldest child was a small infant, R.K. had not resided with the children nor had he been a regular care giver. The children have significant special needs, both physical and emotional. According to the decision of Milner, J.F.C., who heard the protection application, the oldest child's attachment disorder derived, in part, from having been exposed to domestic violence between his parents.

[6] It was the Agency's evidence on the application for extension of time that, once the 30 day appeal period passed with no Notice of Appeal filed, the children were prepared for adoption. This included grief counselling for the loss of their former relationships; a final access visit with their family of origin; and therapy to assist their transition into a new adoptive home. All of these measures were undertaken before the Agency was notified that R.K. intended to apply to extend the time for filing an appeal of the permanent care order. At this point the children, who were by then only 2 and 3 years old, had been in the care of the foster parents for 17 months.

[7] Applying the usual test for an extension of time in such circumstances, (as set out in **Jollymore Estate v. Jollymore**, 2001 NSCA 116; (2001), 196 N.S.R. (2d) 177 (CA in Chambers) at para. 22) Fichaud, J.A. accepted that R.K. had, within the 30 day period, intended to appeal the permanent care order. The judge gave him the benefit of the doubt on the question of whether he had a reasonable excuse for the delay in filing the appeal. However, in a decision dated January 30, 2006 (reported as **Family and Children's Services of Cumberland County v. D.Mc**. 2006 NSCA 19 (C.A.); [2006] N.S.J. No. 50 (Q.L.)) he dismissed the application. In so doing the judge said, in part:

> [22] Dovetailing the paramount interests of the children and the *Jollymore* factors focuses on whether the appellant has a substantial case on the merits based on the children's best interests. Here there are no "compelling or exceptional circumstances" to warrant an extension of time such as "a strong case for error at trial and real grounds to justify appellate interference" under the *Jollymore* formulation. The proposed ground of appeal should be realistic and substantial: *S.E.L.* ¶ 15-23. The draft notice of appeal submitted by R.K. says simply that the Family Court "failed to give appropriate consideration to R.K.'s parenting plan and gave undue consideration to his failure to attend anger management class and access visits".

> [23] The primary reason for the permanent care orders was domestic violence. This resulted in repeated orders that R.K. attend the New Directions Program. The orders are in evidence. His non-attendance is in evidence and was acknowledged in Judge Milner's decision. R.K. chose to disregard the court's repeated directions that addressed the concern leading to the orders which he now seeks to appeal. There is nothing before me to support any "strong case" that the permanent care orders, based on this concern, reflects an ill-founded assessment of the children's best interests.

[8] Thus the appeal process in relation to the permanent care orders was at an end in January 2006.

[9] On June 16, 2006 R.K. applied in the Family Court for an order terminating the permanent care orders (s. 48(3)). As the children had been placed for adoption on May 16, his application was statute-barred (s. 48(4)). In November 2006 that adoption placement broke down and the children were returned to their original Agency foster parents. For informational purposes, pursuant to Regulation 74 of the **CFSA** Regulations (N.S. Reg. 183/91), R.K. was notified by the Agency of this change in the children's status.

[10] On March 1, 2007 R.K. commenced a new application to terminate the permanent care orders. Pursuant to s.76(3) of the **CFSA**, the Agency was prohibited from again placing the children for adoption while that application to terminate was pending. Six months later, on September 24, 2007, R.K. voluntarily withdrew his application. On October 4, 2007, the children were again placed for adoption, this time, in the home of their original foster parents. R.K. was advised of the children's change in status. As stated above, the adoption orders were granted on April 24, 2008.

[11] On May 26, 2008, R.K. filed a Notice appealing the adoption orders.

[12] The children, who were thirty and fifteen months old, when first taken into care, have now been in the care of foster and adoptive parents continuously for over four years.

ANALYSIS

[13] As stated above, the question on this application is whether R.K. has standing to appeal the adoption orders. The **CFSA** governs adoptions. Section 83 grants the right to appeal from an adoption order:

> 83 (1) A person aggrieved by an order for adoption made by the court may appeal therefrom to the Nova Scotia Court of Appeal within thirty days of the order.

[14] A right of appeal is not known to the common law and exists only if granted by statute. A prospective appellant must bring himself within the class of persons with a right of appeal (**Chagnon v. Normand** (1889), 16 S.C.R. 661, at p. 662; **Welch v. The King**, [1950] S.C.R. 412, at p. 428; **Scullion v. Canadian Breweries Transport Ltd.,** [1956] S.C.R. 512; [1956] S.C.J. No. 30 (Q.L.), at p. 2 of 7 (Q.L.)).

[15] From the time adoption was first created by statute in Nova Scotia the status to appeal an adoption order has been limited to "a person aggrieved" (**Adoption Act**, S.N.S. 1896, c. 9, s.10; **Adoption Act**, R.S.N.S. 1900, c. 122, s.10; **Adoption Act**, S.N.S. 1952, c. 2, s.13(1); **Adoption Act**, R.S.N.S. 1967, c. 2, s. 13). Thus, to have standing to appeal, R.K. must be "a person aggrieved" within the meaning of s.83(1) of the **CFSA**.

(i) "Person Aggrieved" - Generally

[16] I will first address who, generally, falls within the category of "a person aggrieved" and then consider whether R.K. is within that class of persons.

[17] "A person aggrieved" is not defined in the **CFSA**. Not everyone disappointed in the outcome of an event or proceeding is a "person aggrieved". "Aggrieved" means, in law, "having legal rights that are adversely affected; having been harmed by an infringement of legal rights.": *Black's Law Dictionary*, 8th ed. (St. Paul, Minn.: Thomson West, 2004), at p. 73.

[18] In **Re Workmen's Compensation Board**, [1976] N.S.J. No. 370 (Q.L.)(N.S.S.C.A.D.), Coffin, J.A., in Chambers, considered who had status to appeal a decision of that Board as "a person aggrieved". He wrote:

> 27 In *R. v. Nottingham Quarter Sessions, Ex parte Harlow,* [1952] 2 All E.R. 78, Parker, J. at p. 81 quoted James, L. J. in *Ex p. Sidebotham* (1880), 14 Ch.D. 465:
>
> > "But the words 'persons aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

(See to similar effect, **R. v. Burns**, [1972] N.S.J. No. 222 (Q.L.)(Co. Ct.), at para. 9; **Halifax Atlantic Investments Ltd. et al. v. City of Halifax et al.**, [1978] N.S.J. No. 574 (Q.L.)(C.A.)). Thus, to have standing to appeal, the person's grievance must be a legal one (**Harrup v. Bayley** (1856), 6 EL. & BL 218 (Q.S.)).

[19] On the backdrop of such authority, the applicants say that "a person aggrieved" under s. 83 of the **CFSA** means someone whose legal rights have been infringed by the adoption order.

(ii) "Person Aggrieved" - Children and Family Services Act

[20] In determining the meaning of "person aggrieved" one must look at the words as used in the context of the statute in question (**Re Workmen's Compensation Board**, **supra**).

[21] Here we are concerned with the meaning of "person aggrieved" under the **CFSA**. That **Act**, which came into force in 1990, combined, replaced and revised its two predecessor statutes: the **Adoption Act**, R.S.N.S. 1967, c. 2 and the **Children's Services Act,** S.N.S. 1976, c. 8.

[22] Child welfare statutes, such as the **CFSA** and its predecessors, empower the state to intervene in familial relationships, where care givers are unwilling or unable to provide a minimum standard of care for their children's physical or psychological needs (**Children's Aid Society of Winnipeg v. R.I. M.**, [1980] M.J. No. 142 (Q.L.)(Man. C.A.); (1980), 15 R.F.L. (2d) 185 at p. 188; **A.D. v. Porcupine and District Children's Aid Society**, [1984] O.J. No. 1353 (Q.L.) (Ont. Div. Ct.) at para. 32).

[23] The state's duties and powers under the **CFSA** are carried out through the Minister of Community Services or delegated to various child welfare agencies, under the supervision of the Minister.

[24] As the **CFSA** is structured, the child protection process, which authorizes the eventual permanent removal of a child from his/her parent's care, is separate from the adoption process, which permanently places the child with a new family.

[25] The role of an agency is prescribed in s. 9. Particularly relevant here are:

> 9 The functions of an agency are to
>
> (a) protect children from harm;
>
> ...
>
> (d) investigate allegations or evidence that children may be in need of protective services;
>
> ...
>
> (g) provide care for children in its care or care and custody pursuant to this Act;
>
> (h) provide adoption services and place children for adoption pursuant to this Act;
>
> ...

[26] Protection proceedings are governed by ss. 22 through 51 of the **CFSA**. The effect of a permanent care order is to sever a parent's legal powers and responsibilities from their status as "parent", transferring the former to the child protection agency:

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

(**N.N.M. v. Nova Scotia (Minister of Community Services)**, 2008 NSCA 69; [2008] N.S.J. No. 323 (Q.L.) at para. 66).

[27] No legal rights are reserved to the parent. The permanent care order, which is made pursuant to s. 42(1)(f), brings the protection proceeding to an end and terminates only when the child reaches certain age or status milestones; is adopted; or the court orders its termination (s. 48). The parent's involvement in the child's life ends unless the court, although placing the child in the permanent care of the Agency, also provides that the parent have access (s. 47(2)). Additionally, in certain circumstances, a parent may subsequently apply to terminate the permanent care order (s. 48).

[28] A party to the protection proceeding has 30 days within which to appeal the permanent care order. The appeal must be heard within 90 days of the filing of the notice of appeal, with an outside limit of a further 60 days (s. 49). These tight time frames are in keeping with one of the principles of the **CFSA** which is to avoid procedural delays in determining the best interests of a child (**Nova Scotia (Minister of Community Services) v. B.F.** , 2003 NSCA 119; [2003] N.S.J. No. 405 (Q.L.) at para. 76). The appeal procedure in s. 49 applies only to appeals from court orders made pursuant to ss. 32 to 48 of the **CFSA**, (the protection provisions) and not to adoptions.

[29] As noted above, a party to a child protection proceeding may apply to terminate an order for permanent care (s. 48(3)), subject to certain limitations (s. 48(4) and (6)). Section 36(1) includes the child's parent among those who may be a party to a protection proceeding.

[30] Once permanent care has been ordered, the **CFSA** prioritizes the adoption (permanent placement) of a child over continuing contact with the parent through access (s. 47(2)(a) and (3A)). A parent may not apply to terminate a permanent care order if the child has been placed for adoption and a notice of proposed adoption given (s. 48(4)). This too is consistent with the goal of stabilizing and finalizing the child's circumstances without delay.

[31] The **CFSA** carefully separates the protection and adoption proceedings with ss. 67 to 87 governing the latter. Before the adoption process can commence, the child protection proceeding must be completed and the child placed in the

permanent care and custody of the agency, with no pending proceeding (either an appeal or an application to terminate) before the Court respecting the children:

> 76(3) In the case of a child who is a child in permanent care and custody, the notice of the proposed adoption shall not be given until any appeal from an order for permanent care and custody of the child or from a decision granting or refusing an application to terminate an order for permanent care and custody is heard and finally determined or until the time for taking an appeal has expired. 1990, c. 5, s. 76; 1996, c. 10, s. 14; 2005, c. 15, s. 4.

[32] Where a child is in permanent care the only consent to adoption required is that of the Minister or the agency (s.74(8)). This is consistent with s. 47 which provides that the parent's legal status vis-a-vis the child ended with the permanent care order. A parent may not apply to terminate the permanent care order if a child has been placed for adoption (s. 48(4)), nor is s/he entitled to notice of the proposed adoption.

[33] I have already referred to Regulation 74 of the **Children and Family Services Regulations** made under Section 99 of the **Children and Family Services Act**, S.N.S. 1990, c. 5, as amended, which provides that the agency shall advise a parent "for informational purposes" when a child has been placed for adoption and when the adoption order has been granted. The purpose of such notice is to alert the parent that his or her opportunity to apply to terminate the permanent care order is suspended pending a successful adoption.

[34] While the **CFSA** permits an appeal of a permanent care order by a "party" to that proceeding, an appeal from an adoption order is not limited to a party but broadens the right of appeal to "a person aggrieved". It is important to note here that the **CFSA** provides for private adoptions (where the parent is consenting to the adoption) as well as adoption of a child in care. Section 83(1) applies to appeals from both types of adoptions. The meaning of "a person aggrieved" must be considered in that context.

[35] The expanded right to appeal an adoption order has particular significance in the context of private adoptions. Consider the examples of a person who might be "aggrieved" but was not a party to the adoption proceeding, as provided in the Minister's factum:

- a "parent" as defined in Section 67(1)(f) of the **CFSA**, who did not receive notice of an adoption application or did not consent to the adoption agreement, regarding a child other than a 'child in care', as defined in Section 67(1)(c) of the **CFSA**;

- an applicant for an adoption order who was unsuccessful in the Court below;

- the child who was the subject of the adoption order, by *guardian ad litem* (Section 83(3));

- a person whose consent was necessary for the adoption but whose consent was dispensed with by the Court below under Section 75(4) of the **CFSA**;

- a person whose consent was necessary for the adoption and such consent was obtained by fraud, duress, oppressive or unfair means;

- a person whose application to set aside the order in Supreme Court of Nova Scotia under Section 83(2) of the **CFSA** was dismissed on its merits.

[36] The adoption judge, when determining whether the proposed adoption is in the child's best interests, is expressly prohibited by the **Act** from looking behind the permanent care order. The **CFSA** provides:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> (b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development;

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

(3) Where a person is directed pursuant to this Act in respect of a proposed adoption to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, except clauses (i), (l) and (m) thereof. 1990, c. 5, s. 3.

(Emphasis added)

[37] This further underscores the intent of the **CFSA** that the permanent care order be final and not subject to indirect review. An adoption proceeding is not an opportunity to reconsider a permanent care order. The parent of the child in permanent care has no standing in the adoption proceeding - s/he is not entitled to notice nor is parental consent required. It follows, then, that an appeal from the adoption order cannot be used as a supplement to or a substitute for an appeal of the permanent care order.

[38] R.K. acknowledges that his ultimate goal is to set aside the permanent care order. Procedurally it is unclear how he would accomplish that end. Overturning the adoption, he says, is but a first step. Even could he successfully appeal the adoption order the children would remain in the permanent care of the Agency. R.K.'s right to appeal the permanent care order expired with the (January 30, 2006) decision of this Court denying his request for an extension of time to file the appeal. That would remain unchanged.

[39] R.K. says this is an exceptional case. He submits that he should be granted standing to appeal the adoption order because Milner, J.F.C.'s reasons for placing the children in permanent care are deficient on their face. As discussed above, Fichaud, J.A., in declining to extend the time for filing the appeal reviewed R.K.'s proposed grounds of appeal and found no "compelling or exceptional circumstances" to warrant an extension of time such as "a strong case for error at trial and real grounds to justify appellate interference". The alleged deficiencies in Milner, J.F.C.'s reasons leading to permanent care were canvassed and found wanting.

[40] It bears noting that in September 2007 R.K. abandoned his last application to terminate the permanent care order. Should he again apply to terminate, which would be the only course open to him if the adoption was set aside, the court hearing the application must assume that the permanent care order was properly granted. On a termination proceeding, unlike a protection hearing, the judge considers not only whether the applicant parent has remedied the circumstances which triggered the permanent care order but also whether it is in the best interests of the child to remove him from his new environment. In **Catholic Children's Aid Society of Metropolitan Toronto and Official Guardian v. M.(C.)**, [1994] 2 S.C.R. 165, L'Heureux-Dubé, J., writing for the Court, discussed this broader

focus, in the context of the Ontario "status review" hearing which is the equivalent of our termination application at p. 200:

> The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time. . . .
>
> Regardless of the conclusion reached at this first stage, the need for continued protection encompasses more than the examination of the events that triggered the intervention of the state in the first place. As the Court of Appeal further noted:
>
> > We do not agree, however, that this means, in the absence of proof of some deficiency in the present parenting capacity on the part of the natural parent, that the child must be returned to the care of the natural parent. A court order may also be necessary to protect the child from emotional harm, which would result in the future, if the emotional tie to the care givers whom the child regards as her psychological parents, is severed. Such a factor is a well recognized consideration in determining the best interests of the child which, in our opinion, are not limited by the statute on a status review hearing.
>
> (Emphasis added)

(see also **S.G. v. Children's Aid Society of Cape Breton**, [1996] N.S.J. No. 180 (Q.L.)(C.A.)) .

[41] As I have already noted, the children have been in the care of their adoptive parents almost continuously since 2004 - in effect, for most of their young lives. In view of the above test, the futility of R.K.'s proposed course of action is obvious.

[42] The drafters of the **CFSA** could not have intended that the parent of a child placed in the permanent care of an agency and subsequently adopted be permitted to collaterally attack the permanent care order, as is R.K.'s intent, through the adoption appeal process, thereby further delaying the final settlement of a child.

[43] I would find that R.K., as the parent of a child who has been placed in permanent care, is not a "person aggrieved" within the meaning of s. 83(1) of the **CFSA** and, accordingly, does not have standing to appeal the adoption orders. His legal rights and obligations as a parent of these children were extinguished by the permanent care order; he no longer has a right of appeal from that order; he has no legal rights which were adversely affected by the adoption order.

DISPOSITION

[44] Having found that R.K. has no standing to appeal the adoption order it follows that his appeal is "absolutely unsustainable" (**Ingham v. West Hants (Municipality)**, 2006 NSCA 37). I would quash the Notice of Appeal.

[45] In my view R.K.'s appeal was ill-founded and entirely without merit. The applicants (respondents) have been put to considerable expense in the perfection of this application. While the Minister has not sought costs, the Agency points out that funding a matter such as this directly impacts its limited financial resources and asks that costs be ordered. Given the obvious lack of merit in this appeal, I would order that R.K. pay costs to the Agency in the amount of $2000.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.